EVEBRIEF

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MARGIN FOR ERROR AND LPAS BEWARE

This is a particularly bumper edition of Evebrief containing a number of noteworthy cases in relation to service charges, planning, rating and professional negligence to name but a few.

At item 28 we report on the Court of Appeal decision on an allegedly negligent 2005 loan security valuation of a large commercial property in Nuremberg, Germany based on a third party lender's instructions to assume a specific passing rent. The Court found in favour of the valuers, but what is more interesting is the surprising outcome that 15% difference in value either side of the 'correct' value is apparently the new 'margin for error'. The difference in this case was between the valuation at 135 million euros and the 'correct' value of 118.3 million euros; 15%, particularly at these levels of values, is quite some margin!

At Item 7 we report on another Court of Appeal case where Worcestershire County Council sought to overturn a ruling that the developer could elect to continue and complete a development under a second planning permission rather than proceed with the first permission. The latter required the developer, under a 's106 agreement' to pay £800,000 towards transport and infrastructure services to the city which was to be paid in three instalments. Whilst the first instalment was paid, the development was subsequently sold but the vendor contracted to pay the transport contribution. The new developer then entered into a unilateral undertaking indicating its intention to implement the second planning permission and to 'dispense with the implementation' of the first planning permission which of course included payment of the s106 payment obligations. The Court found in favour of the developer; rather a hard lesson for the Council, and planning authorities need to be aware of the possible consequences of two planning permissions carrying different obligations.

Gemma Dow
Editor

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LANDLORD & TENANT

01 Technology and Construction Court

Breach of covenant – dilapidations – damages – whether repairing costs capped by s18(1) Landlord & Tenant Act 1927 – whether damages for reinstatement and statutory items being remedial costs or effect on diminution in value

*CONSORTIUM COMMERCIAL DEVELOPMENTS LTD V ABB LTD
[2015] PLSCS 261 – Decision given 30.07.15

Facts: A lease of commercial premises which expired in June 2011 contained a full repairing obligation, the repairing obligation was limited by a schedule of condition attached to the lease. It was common ground that given the weak state of the market in 2011 it was unlikely that the premises would be relet while out of repair, that the estimated cost of remedying breaches of covenant at the end of the lease would be approximately £315,000 and that the remedial works would take 12 weeks. The claimant landlord claimed loss of rent and rates during that period, but there would be a credit for the defendant's overpaid rent at the expiry of the lease.

Points of dispute:

i. Whether, in the light of the diminution in value of the reversion by reason of the lack of repair, the head of claim for repair costs was capped by s18(1) of the Landlord & Tenant Act 1927. This would cap the amount payable by reference to the diminution in value of the landlord's reversion and prohibited landlords from recovering damages for terminal dilapidations if the premises were to be demolished or structurally altered such that the repairs would be rendered useless.

ii. Whether damages for the reinstatement and statutory items should be based on their remedial cost or their effect on diminution in value.

iii. Whether the claimant could also recover rent and rates for the estimated duration of the remedial works.

iv. Whether the credit to the defendant for overpaid rent should include VAT.

v. The appropriate rate of interest.

Held: The claim was allowed in part.

i. The court placed greater reliance on the evidence of the defendant's expert who had looked at a range of comparables. On the evidence the value of the building in repair would be assessed at £900,000 and out of repair at £675,000. Applying s18 the maximum that the claimant could recover by way of damages for dilapidations was £225,000 representing the diminution in value of the reversion.

ii. If the landlord claimed reinstatement the question to consider was whether reinstatement was reasonable and if the landlord was unlikely to carry out the work the measure would be the diminution in value of the reversion. In this case it was likely that the works would be carried out by the claimant in due course so the appropriate measure of damages was the agreed cost as claimed.

iii. Due to the state of the market in 2011, even if the property had been in a good state at the end of the term the claimant would have been unlikely to secure a prompt let. Accordingly, the claimant could not recover loss of rent and rates resulting from the defendant's breaches of covenant.

iv. The appropriate amount of rent credit had to include VAT since it was a reversal of a transaction carrying VAT.

v. Interest at 2.5% above base rate was awarded.

02 Upper Tribunal: Lands Chamber

Service charges – VAT – whether appellant liable to pay sums charged by managing agents as VAT on fees for human resources and salaries

* INGRAM V CHURCH COMMISSIONERS FOR ENGLAND
[2015] PLSCS 285 – Decision given 15.09.15

Facts: The appellant, I, was the long lessee of a flat in London W2 the freehold of which was owned by the respondents, CCE. I applied to the First Tier Tribunal (FTT) under s27A of the Landlord and Tenant Act 1985 to determine the reasonableness of service charges levied by CCE between 2010 and 2014 as she disputed her liability to pay the VAT charged by the managing agents to CCE on fees for salaries and human resources services for staff employed for the building. I argued that CCE were not obliged to pay VAT on these items which meant that the VAT element was unreasonably incurred for the purposes of s19 of the 1985 Act and should not be passed on to the lessees.

Point of dispute: Whether to allow I's appeal against the decision of the FTT that I was liable to pay the VAT. The issue turned on whether the VAT fell within an extra-statutory concession set out in para 3.18 of VAT Notice 48 by which an exemption from VAT was granted on 'all mandatory service charges or similar charges paid by the occupants of residential property towards the upkeep of the dwellings or block of flats in which they reside and towards the provision of a warden, caretakers and people performing a similar function for those occupants.'

Held: The appeal was dismissed.

- The concession in para 3.18 of VAT Notice 48 had been introduced in order to remedy an anomaly in the legislation whereby residential occupiers who paid a service charge to a third party, rather than to the person who supplied their accommodation, had to pay VAT on the service, whereas there was no VAT on mandatory service charges paid to the landlord. The concession removed the disparity in VAT treatment by exempting the occupier from VAT on mandatory service charges payable to someone other than the supplier of accommodation.
- The concession did not apply to the disputed charges in this case. None of the charges in question were mandatory service charges paid by I, the appellant, as required by the first part of the concession. The mandatory service charges which I paid were those invoiced to her by the managing agent on behalf of CCE.
- The sums which I was disputing were paid by the lessor to a third party for the provision of services by the third party to the lessor. The position with such charges was the same as with any other services supplied to CCE to enable them to fulfil their obligations under the lease, such as cleaning and maintenance of the building. The concession did not apply to any charges paid by the landlord to third parties for the supply of services, even if the cost of those services was passed on to a residential occupier through a service charge. The fact that charges for those services were passed on to the lessees as service charges did not convert sums paid by the lessor to third parties into mandatory service charges paid by the lessees.
- The purpose of the concession was to deal with a minor gap or anomaly in VAT liability and was not intended to apply so as to exempt large numbers of suppliers of services who normally paid VAT from an obligation to do so when the charges were passed on to residential occupiers as service charges.

03 Upper Tribunal: Lands Chamber

Service charge – appellant applying under s27A of the Landlord and Tenant Act 1985 for determination of whether service charges reasonable, including charges dating back 12 years

*CAIN V ISLINGTON LONDON BOROUGH COUNCIL
[2015] PLSCS 284 – Decision given 25.09.15

Facts: The appellant, C, acquired a lease of a one-bedroom flat in London N1 in 2002. The landlord was the respondent council, ILBC. In July 2014, C applied to the First Tier Tribunal (FTT) under s27A of the Landlord and Tenant Act 1985 to determine the reasonableness of the service charges levied over the 12-year period from 2002 to 2013. The FTT determined that C could not challenge the reasonableness of any service charges for periods more than six years ago since he had agreed or admitted to them within the meaning of s27(A)(4). He had paid them and had also waited a very long time to bring the challenges.

Point of dispute: Whether to allow C's appeal against the FTT's decision. The FTT had found that C's challenge was statute-barred, as a restitutionary claim for repayment of a service charge to which a six-year limitation period applied, or was barred on the grounds of laches.

Held: The appeal was dismissed.

i. An agreement or admission for the purposes of s24A(4) could be express, implied or inferred from the facts and circumstances, although it had to be clear and based on the objectively ascertained intention of the tenant. There had to be some conduct which gave rise to a clear implication or inference that the sum demanded was agreed or admitted by the tenant. Making a single payment would never be sufficient on its own to make a finding of agreement or admission, but making multiple payments over time might suffice, particularly if they were a series of unqualified payments of demanded service charges made without protest.

ii. From the facts and circumstances of this case the FTT could find that C had agreed or admitted the service charge items in respect of 2001-07 which he now sought to challenge. There had been a series of payments for the demanded service charges throughout the six-year period and a long period of time had elapsed before the first challenge was made.

iii. However, the FTT had erred in holding that C's application was statute-barred. An application under s27A of the 1985 Act would, if successful, result in a determination as to the reasonableness of amounts claimed, but it was not a claim for repayment of service charges to which a six-year limitation period applied under the Limitation Act 1980.

04 CLG Guidance

Model agreement for shorthold assured tenancy and accompanying guidance

This model tenancy agreement, which has been updated in order to reflect recent legislative changes which came into force on 01.10.15, contains guidance on its use and the clauses in it. It is particularly relevant when parties are entering into tenancies of two years or longer containing provisions relating to rent reviews and those which enable the landlord or the tenant to bring the tenancy to an end early should their circumstances change.

https://www.gov.uk/government/publications/model-agreement-for-a-shorthold-assured-tenancy

05 Statutory Instrument

SI 2015/1725 The Assured Shorthold Tenancy Notices and Prescribed Requirements (England) (Amendment) Regulations 2015

These Regulations, which came into force on 30.09.15 substitute a new form for the one contained in the Schedule to the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015 (SI 2015.1646) in order to correct an error which was identified in the original form.

http://www.legislation.gov.uk/uksi/2015/1725/contents/made

06 CLG Guidance Note

Retaliatory Eviction and the Deregulation Act 2015: guidance note

On 01.10.15 a number of provisions in the Deregulation Act 2015 came into force. These will apply to all new assured shorthold tenancies that started on or after that date and are designed to protect tenants against unfair eviction where they have raised a legitimate complaint about the condition of their home. Landlords are now under an obligation to provide all new tenants with information about their rights and responsibilities as tenants and they cannot serve a s21 notice unless they have complied with certain legal responsibilities. A new standard form has been introduced which landlords must use when evicting a tenant under the 'no fault' (s21) procedure.

https://www.gov.uk/government/publications/retaliatory-eviction-and-the-deregulation-act-2015-guidance-note

If you require advice on landlord & tenant issues, contact Graham Foster on Tel. +44 (0)20 7653 6832 gfoster@geraldeve.com

PLANNING

07 Court of Appeal

Planning permission for residential development granted subject to developer paying transport contributions to appellant highway authority – second permission for same development without requirement for transport contributions – whether developer entitled to continue development under second permission without paying transport contribution

*R (ON THE APPLICATION OF ROBERT HITCHINS LTD) V WORCESTERSHIRE COUNTY COUNCIL [2015] PLSCS 297 – Decision given 27.10.15

Facts: In 2012 planning permission was granted for a residential development in Worcester, subject to a s106 agreement under which the respondent developer, RH, was obliged to make a financial contribution of approximately £800,000 towards transport and infrastructure services for the city. This was to be paid to the appellant highway authority, WCC, in three instalments. Before building commenced RH sold the site to another developer, but under the sale agreement, RH agreed to pay the transport obligation. The development commenced in October 2013 and RH paid the first instalment. As contemplated by the sale agreement RH then obtained a second permission for the same development, but this permission did not contain the obligation to pay the transport contribution. The new developer then entered into a unilateral undertaking, under s106 of the 1990 Act, indicating its intention to implement the second planning permission and to 'dispense with the implementation of' the first planning permission.

Point of dispute: Whether to allow WCC's appeal against the ruling of the judge in the court below that:

i. the developer could in law elect to continue and complete the development under the second planning permission as perfected by the approval of reserved matters, rather than proceed with the first permission; and

ii. on the facts of the case it had so elected.

WCC argued that the developer could not dispense with the implementation of the first planning permission since it had already been 'implemented' by commencement of development.

Held: The appeal was dismissed.

i. The developer's s106 undertaking should be interpreted in accordance with principles applicable to the construction of commercial contracts. Construing the unilateral undertaking against the relevant documentary, factual and commercial background and to give it a meaning that avoided ineffectiveness, the word 'implementation' should be read as referring to the carrying out of the development authorised by the relevant planning permission, not to the commencement of that development.

ii. The judge had been entitled to find that after the approval of reserved matters under the second planning permission the developer had carried out building operations on the site pursuant to the second, not the first, permission with the consequence that no further transport contributions were payable. As a matter of principle, where two planning permissions existed for the same land a developer could choose between them. Once the obligations under the developer's unilateral undertaking came into force the development had thereafter carried on under the second permission. It did not matter that it was impossible to tell from what was going on at the site whether operations were being carried out under the first or second permission.

iii. The fact that some development had already been carried out under the first permission did not prevent the carrying out of further development pursuant to the second permission given the consistency between them.

08 Court of Appeal

Core strategy – s33A Planning and Compulsory Purchase Act 2004

*SAMUEL SMITH OLD BREWERY (TADCASTER) V SELBY DISTRICT COUNCIL
[2015] PLSCS 311 – Decision given 05.11.15

Facts: The appellant brewery, SSOB, was a major landowner in the area for which SDC was the local planning authority (lpa). In 2011 SDC presented their submission draft core strategy for public examination pursuant to s20 of the Planning and Compulsory Purchase Act 2004 ('the 2004 Act'). The draft was unsound and the inspector appointed by the Sec of State suspended his examination. SDC commenced further work on the plan and during this period s33A of the 2004 Act came into force - this imposed a duty on lpas to co-operate with other relevant bodies when preparing plans relating to strategic planning matters. SDC presented its proposed changes to the inspector and the public examination recommenced in April 2012. The inspector ruled that the s33A duty did not apply after the draft core strategy had been submitted for examination. He concluded that the strategy was sound provided that it was substantially modified, including the modifications proposed by SDC during the period of suspension. SDC adopted the core strategy in its amended form.

Point of dispute: Whether to allow SSOB's appeal against the decision of the judge in the court below who dismissed its claim for the adopted core strategy to be quashed. The judge held that the s33A duty only applied at the plan preparation stage, which ended with the submission of the plan for examination.

Held: The appeal was dismissed.

- The work done by SDC during the suspension would have qualified as 'preparation' within the meaning of s33A of the 2004 Act if it had been carried out before the core strategy was submitted for examination, but the judge was correct to rule that the s33A duty ceased to apply at the point of submission.
- The preparation of the local development document by the lpa, pursuant to s19, and the independent examination by an inspector under s20 were distinct, separate and sequential stages of the plan-making process.
- At the examination stage the inspector was in charge of what happened to the plan, including how problems with it should be addressed. The lpa could ask him to recommend modifications.
- The duty to cooperate applied only to the plan preparation stage under s19, before the plan was submitted for examination. The duty did not subsist during the examination stage, and did not revive if the examination was adjourned or suspended for modifications to be produced and presented to the inspector.

09 Planning Court

Noise – planning permission granted on appeal for development of commercial units and flats adjacent to claimant's music venue – risk to business from noise complaints

*FORSTER V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
[2015] PLSCS 254 – Decision given 06.08.15

Facts: The claimant, F, owned a tavern which was used for live music events, film-making and photographic shoots. A developer applied for planning permission to demolish the building next door and replace it with a mixed use three-storey building, including commercial uses and flats. F objected to the proposal on the grounds that the development might jeopardise her business as there was a risk that residents of the flats would complain about noise from the tavern. The lpa refused permission for the development, but that decision was overturned on appeal by an inspector appointed by the Sec of State. In reaching his decision the inspector considered an acoustic report submitted by the developer on noise levels and the effectiveness of proposed sound insulation measures and concluded that permission should be granted subject to a condition requiring the developer to obtain the lpa's approval to a scheme to protect the residents of the flats from noise and prohibiting their occupation until it was shown that suitable sound insulation had been achieved.

Point of dispute: Whether to allow F's claim under s288 of the Town and Country Planning Act 1990 to quash the grant of permission. F argued that the inspector had erred in his consideration of the noise issue and that the conditions attached to the permission were inadequate to deal with it. He had failed to have regard to the harm that the development might cause to the operation of her established business as noise complaints from residents could result in enforcement action from the council or revocation of the tavern's late night music licence.

Held: The claim was dismissed.

i. The inspector had not erred in his consideration of the noise issue. He had exercised his own judgment on the issues and correctly identified the main one which was whether residents of the new building would be subjected to unreasonable levels of noise. He had taken into account F's concern about the effect of possible complaints on the operation of her business. The conclusions he had reached were open to him on the evidence and the conditions attached to the grant of permission were adequate.

ii. The inspector had not erred in his consideration of the effects of the development on the viability of the tavern or failed to grasp the true nature of F's objection to the proposal. He could not be criticized for not considering the law of nuisance as his remit was to decide on the planning merits of the application, having regard to the public interest, and he had done this. He had correctly exercised his planning judgment.

10 Planning Court

Application for judicial review of decision of lpa to grant planning permission for testing and evaluation track for performance cars – local plan policy – impact on listed building – noise issues

*R (ON THE APPLICATION OF NICHOLSON) V ALLERDALE BOROUGH COUNCIL
[2015] PLSCS 295 – Decision given 12.10.15

Facts: The occupiers of Dovenby Hall Estate, near Cockermouth in Cumbria, formerly occupied by the NHS as a hospital and including a Grade II listed building, were granted planning permission for change of use of the hospital buildings and used the site for the manufacture of performance cars. In 2004 they applied for permission to extend the development which would enable their business to expand, including the construction of a track for the testing and evaluation of rally, track and road cars.

Point of dispute: Whether to allow N's application for judicial review of the planning permission. N argued that:

i. ABC had misinterpreted policy REM10 of the Allerdale Local Plan;

ii. ABC had failed to comply with s66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 when assessing the impact of the development on the listed building; and

iii. ABC had failed to deal correctly with the issue of noise from the track for local residents.

Held: N's application was allowed in part.

i. On the facts ABC had not misinterpreted this policy.

ii. N's allegation was not made out. ABC had not merely carried out a simple balancing exercise between the harm to the setting of the listed building and the benefits of the proposal, but they had also weighed the s66(1) presumption in the balance.

iii. ABC had intended to impose controls with respect to the variable character of the noise when it approved details under the planning permission, but the conditions it had imposed had failed to do this. As regards this part aspect of the challenge, the judicial review succeeded. However, due to public interest in the development proceeding, it was preferable for the court to allow the parties an opportunity to seek to remedy the flaw identified rather than for the permission to be quashed, provided that could be achieved within a finite and reasonably short timescale. Accordingly the planning permission would not be quashed, but a declaration that N had been partially successful would be made.

11 Planning Court

Claimant objector applying for judicial review of planning permission for mixed use development in Chiswick – local plan policy – whether defendants acting contrary to principles of natural justice and requirement for fair consultation

*KVERNDAL V HOUNSLOW LONDON BOROUGH COUNCIL
[2015] PLSCS 305 – Decision given 28.10.15

Facts: The claimant, K, applied for judicial review of HLBC's decision to grant planning permission for a residential-led mixed use development at 408-435 Chiswick High Road, West London.

Point of dispute: Whether to allow K's application on the basis of the following arguments:

- misleading analysis of emerging policy, particularly with reference to a tall building policy;
- failure to evaluate the true fall-back position in a situation where there was a prior approval for the exercise of permitted development rights;
- there had been a breach of policy in the local plan;
- HLBC's approach to late marketing evidence had been unfair; passages in the statement of community involvement (SCI) created a legitimate expectation that objectors would have an opportunity to respond to further documents produced during the application process; and
- the approach to compliance with s72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 had been legally deficient.

Held: The application was dismissed.

i. The court was not satisfied that the planning officers had failed to take the tall buildings policy into account or that there had been an unlawful interpretation of the policy.

ii. It had not been suggested that there was no possibility of the prior approval being implemented. It was therefore open to the planning committee to treat the prior approval as a material consideration, to conclude it was a material fall-back option and attach some weight to it.

iii. The legal requirement was to determine the application as against the development plan as a whole. The proposal had been in accordance with this as the planning officer had made clear, notwithstanding that there had been a breach of the active marketing condition in the local plan.

iv. A legitimate expectation had not arisen in this case. The SCI did not contain a promise to consult on documents received during the course of the application. The contention of procedural unfairness in the determination of the planning application was rejected.

v. HLBC had been well aware of the requirement under s72 of the 1990 Act to have special regard to the desirability of preserving or enhancing the character or appearance of a conservation area. Section 72 did not, however, amount to a duty to maximise enhancements of the conservation area. K's contention that HLBC had failed in its duty under s72 in respect of the Turnham Green Conservation Area was rejected.

12 Bill

Housing and Planning Bill

This was introduced in Parliament on 13.10.15. Key measures include the following:

- The provision of 200,000 starter homes: councils will have a legal duty to provide starter homes at a 20% discount to market value for first time buyers on all reasonably sized developments;
- Local plans: intervention for councils that have not laid out strategies by 2017;
- Pay to stay: to ensure that tenants on higher incomes who are living in social housing pay a rent that is in line with their income;
- Sales of high value council homes: local authorities will be under a duty to release high-value homes when they become vacant;
- Automatic planning permission: in principle on brownfield sites, in particular to bring forward public sites with contamination issues;
- CPO changes: to assist in bringing more brownfield land into the system;
- Registers of land owned by local authorities;

- Planning reforms to support small builders: councils must allocate land to meet a national target of 20,000 self-built homes a year by 2020; and
- Combating rogue landlords: council powers to blacklist and ban those who act illegally, including a database of those acting illegally.

13 CLG Policy Paper

Nationally significant infrastructure projects and housing: briefing note

This briefing note provides further information on the nationally significant infrastructure planning clause of the Housing and Planning Bill (Clause 107) which was introduced in the House of Commons on 13.10.15. The clause fulfils the commitment made by the government in its productivity plan *'Fixing the foundations: creating a more prosperous nation'* to legislate to allow consent for an element of housing to be given when development consent is granted for a nationally significant infrastructure project. Developers should be able to seek development consent for housing in cases where:

- there is a functional need for the housing in terms of the construction or operation of a project e.g. where housing (rather than temporary accommodation is needed for construction workers or to support a 24-hour presence on the site for key workers; or
- the housing is not functionally linked to the infrastructure project but is in geographical proximity to it.

Further details on the circumstances where housing will be acceptable and the amount and type of housing that would be allowable are to be set out in guidance rather than primary legislation and this briefing note therefore includes a draft guidance note.

https://www.gov.uk/government/publications/nationally-significant-infrastructure-projects-and-housing-briefing-note

14 CLG Press Release

Changes to permitted development rights

On 13.10.15 the Housing and Planning Minister announced that the permitted development rights introduced in 2013 which enable offices to be converted to new homes without having to apply for planning permission are to be made permanent – originally, these rights would have expired on 30.05.16. Where developments have already been granted permission they will have three years in which to complete the change of use. In addition, demolition of office buildings in order to enable new homes to be built is to be permitted, subject to limitations and prior approval by the local planning authority. New permitted development rights will also enable the change of use of light industrial buildings and launderettes to new homes, but again these rights will be subject to prior approval by the local planning authority.

Those areas that are currently exempt from the office to residential permitted development rights will have until May 2019 to make an Article 4 direction if they wish to continue determining planning applications for change of use.

https://www.gov.uk/government/news/thousands-more-homes-to-be-developed-in-planning-shake-up

If you require advice on planning & development issues, contact Hugh Bullock on Tel. +44 (0)20 7333 6302 hbullock@geraldeve.com

RATING

15 Upper Tribunal: Lands Chamber

Rating of shop in parade fronting onto harbour in St Ives, Cornwall – whether RV should be reduced because of lease terms – whether shop wrongly valued as ground-floor property

*WILLIAMS V MURDOCH (VO)
[2015] PLSCS 273 – Decision given 09.09.15

Facts: The appellant ratepayer, W, held a lease of a shop in a parade fronting onto the harbour in St Ives, Cornwall. The shop was elevated above street level and was accessed via seven steps which led up to the front balcony area. The shop was entered in the 2010 rating list with RV £11,250, based on the rental value of the property on the statutory hypothesis with an end allowance of 5% for the disadvantage of stepped access. W's rent was £13,000 pa and he paid a £5,000 premium when he took over the lease which was for six years from 2010 and was contracted out of the security of tenure provisions of the Landlord & Tenant Act 1954.

Point of dispute: Whether to allow W's appeal against the decision of the VTE that the rateable value of the property should not be reduced to £1. W argued that the terms of the lease were incompatible with the rating hypothesis contained in the Local Government Finance Act 1988 because it was for a fixed term with no reasonable prospect of continuance, had a premium attached to it and contained a restrictive user clause. W also argued that the property should not have been valued as a ground-floor retail unit because it was accessed via steps and that it should be treated as having a 'hard frontage' which reduced its value.

Held: The ratepayer's appeal was dismissed. Although the property was not let on statutory hypothetical terms the actual rent was key – the features of the letting mentioned by W did not assist his case. Other comparable evidence could be considered. The shop was clearly on the ground floor since first floor properties on the Wharf were at a much higher floor level and it was not appropriate to take an average of the rents of ground and first floor properties along the Wharf when arriving at a valuation for W's shop. In valuing the property the rent assessment evidence from it and the adjacent property should be given the most weight. If anything, the rent that W was paying might be too low when considered on a statutory hypothetical basis. The RV of £11,250 was confirmed.

16 Upper Tribunal: Lands Chamber

Procedure – appeal by ratepayer to VTE – Valuation Officer (VO) barred from attending – whether VO could appeal against VTE's decision – whether VO had 'appeared' at VTE hearing so as to give right of appeal – whether informal attendance of 'observer' sufficient

*WASSILJEW-JONES (VO) V DONE BROS (CASH BETTING) LTD (T/A BETFRED)
[2015] PLSCS 287 – Decision given 16.09.15

Facts: The respondent ratepayer appealed to the Valuation Tribunal for England (VTE) against the RV shown in the rating list for some betting shops in Wigan. The relevant valuation officer failed to submit a statement of case within the relevant deadline which meant that he was barred from taking part in any further proceedings before the VTE. His application to lift the bar was unsuccessful. The VO sought to appeal to the Upper Tribunal but the ratepayer contended that he had no right of appeal against the VTE's decision since he had not 'appeared' at the hearing within the meaning of Regulation 42(2)(a) of the Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) Regulations 2009. The VO argued that as he had sent a representative to attend the hearing as an 'observer' that was sufficient to preserve a right of appeal.

Point of dispute: Whether to allow the ratepayer's application for reconsideration of the decision of the registrar that the VO was entitled to appeal.

Held: The application was allowed. The VO had not 'appeared' at the hearing for the purposes of Regulation 42(2)(a) of the 2009 Regulations. A party could appear in person or by a representative, but the VO had neither appeared personally nor appointed a representative. The name of the person who had attended had not been given and there was no record in the decision of any appearance or attendance of any representative on behalf of the VO. A person could not 'appear' at a VTE hearing as a representative, who did not make themselves known as such but who attended anonymously as an observer.

17 Upper Tribunal: Lands Chamber

Rateable value of vacant retail unit containing asbestos and proposed for redevelopment – whether unit to be valued as if in state of reasonable repair

*BARBER (VO) V CEREP III TW SARL
[2015] PLSCS 288 – Decision given 21.09.15

Facts: The respondent ratepayer owned a retail unit in Tonbridge Wells which was originally entered in the 2010 rating list with RV £57,000. The unit formed part of a redevelopment scheme originally proposed in 2000. At the material day in April 2010 it was vacant, derelict and showed the presence of asbestos and in July 2013 it was demolished. In July 2014 the VTE allowed the ratepayer's appeal against the rating list entry and decided that the rateable value of the unit should be assessed at nil w.e.f. April 2010 since it was not capable of beneficial occupation. The works necessary to remedy that situation went beyond works of repair and would fall outside the statutory rating hypothesis of reasonable repair envisaged by para 2(1)(b) of Schedule 6 to the Local Government Finance Act 1988.

Point of dispute: Whether to allow the VO's appeal against the VTE's decision. The VO argued that following the 2015 Court of Appeal decision in *SJ & J Monk (a firm) v Newbigin* the question of beneficial occupation was irrelevant and instead the test was whether:

i. the unit was in a state of disrepair;
ii. the necessary remedial works were works of repair; and
iii. a reasonable landlord would consider it economic to carry them out.

He submitted that works to remedy the asbestos problem were works of repair which a hypothetical landlord would consider economic. On the issue of the how the planning permission for the proposed redevelopment might affect the valuation he submitted that the hypothetical landlord would not necessarily want to participate in any redevelopment if he could repair and relet his property without it.

Held: The appeal was dismissed. In the light of the *Newbigin* decision the VTE's decision could not stand and the value of the unit needed to be determined afresh. However, applying the correct test the unit should still be valued at nil. In April 2010 it was not in such a state of repair as, having regard to its age, character and locality, would make it reasonably fit for the occupation of a reasonably minded tenant. The substantial works required to make the unit fit for occupation were repairs, but a landlord would consider it uneconomic to do them in the light of all the circumstances including the redevelopment scheme. The rating hypothesis required the physical nature of the property in question and the surrounding area and circumstances to be reflected in the valuation. At the material day the unit and all other properties on the development site were vacant and surrounded by hoardings. In the real world no landlord had sought to repair and relet properties in the area covered by the planning permission. The repairs should be ignored for the purposes of the valuation and the RV of the unit should be assessed at nil.

18 Upper Tribunal: Lands Chamber

Exemption from non-domestic rates – modern retail warehouse on site adjoining farmland – appellant using warehouse to store animal feed and agricultural machinery while negotiating sale to supermarket chain – whether warehouse exempt from rates for period of storage use

*WOOTTON (T/A EF WOOTTON & SON) V GILL (VO)
[2015] PLSCS 294 – Decision given 15.10.15

Facts: The appellant ratepayer, W, owned a retail warehouse in an out-of-town shopping area east of Bedford, next to a main road leading to the town centre, but bounded on the other side by land which W owned and farmed himself. The warehouse had been let to a company which sold household goods and furnishings from it, but in 2009, after the company became unable to pay the rent, W retook possession of it. At that point W was in negotiations with a supermarket chain for the possible sale of the warehouse for conversion to a food superstore, but this deal was dependent upon planning permission and the construction of a new service road. The sale to the supermarket chain proceeded in 2012. Between June 2010 and January 2012 W used the warehouse for the storage of silage bales, which he made on his adjoining land, animal feed and agricultural machinery. The warehouse was entered in the 2010 rating list with RV £342,000.

Point of dispute: Whether to allow W's appeal against the decision of the VO, upheld in the Valuation Tribunal for England, that the unit should not be deleted from the rating list for the period from June 2010 to January 2012. The VO and the VTE did not accept W's argument that it was exempt from rates under para 3(a) of Schedule 5 of the Local Government Finance Act 1988 as an agricultural building occupied together with agricultural land and used solely in connection with agricultural operations on that land. The VO argued that the warehouse could not benefit from the exemption when the storage use of the unit was a 'contrivance' designed to avoid liability for rates.

Held: W's appeal was allowed.

- All factors had to be taken into account to determine whether a building and land were worked together so that the building was 'occupied together with' agricultural land.
- W's motivation of avoiding the liability to pay non-domestic rates made no difference because it was well established that an arrangement should not be treated differently just because it existed for the purpose of tax avoidance.
- The way in which W had used the warehouse during the relevant period was substantial, exclusive, beneficial and prolonged.
- The unit was occupied together with W's adjoining agricultural land and the remainder of his holding, all of which were managed by him as a single agricultural unit. It was therefore occupied 'together with' agricultural land between June 2010 and January 2012 and satisfied the first limb of para 3(a) of Schedule 5.
- It also satisfied the second limb of para 3(a) because the warehouse had been used solely in connection with the agricultural operations which W carried out on his land – the focus should be on the use itself, not the motive for that use. The fact that it was not necessary for silage and machinery to be stored in the building was irrelevant.

19 Upper Tribunal: Lands Chamber

Transitional certificate – whether the tribunal has jurisdiction to alter a certificate other than on the grounds of value – whether the valuation officer impugned the rating list.

*HOWARTH (VO) V THE DOG & GUN (OXENHOPE) LTD
[2015]UKUT 0475 (LC) – Decision given 14.07.14

Facts: This case concerned a Regulation 15 certificate appeal. The Appellant occupied a property near Oxenhope in West Yorkshire which he operated as a country inn/restaurant. After alterations made to the building in 2007, the Valuation Office served notice to increase the 2005 RV from £9,650 to £10,750. In 2013, two years after receiving a Form of Return, the Valuation Office increased the 2010 assessment to £77,000. Regulation 14 and 15 certificates under the Chargeable Amounts (England) Regulations 2009 ('the 2009 Regulations') were also served at £77,000. The Appellant appealed the 2010 rating list entry, resulting in a reduction to £68,000. The VTE determined the property's entry in the rating list on 31.03.10 was too low. It considered the VO was correct, in accordance with Regulation 17(1) of the 2009 Regulations, to issue a Regulation 15 certificate, highlighting the ratepayer's failure to supply accounts as the root cause of the error.

Issues: (i) Was the Valuation Office correct to serve a Regulation 15 Certificate (31.03.2010)? (ii) On the basis that Regulation 15 was appropriate, what is the correct rateable value? Both parties considered the figure of £68,000 to be excessive – the VTE's decision being incorrect on the grounds of value. The VO submitted that the RV should be £41,000 while the Appellant ratepayer argued for £10,750.

Held: Finding for the VO, the Regulation 15 certificate was altered to £41,000:

i. The Appellant was wrong to contend the Valuation Office was impugning the list – the VO had invoked the statutory instrument;

ii. The two-year period which elapsed after the receipt of information before the list alteration was unreasonable. The court did not have jurisdiction to order the withdrawal of the certificate;

iii. On the matter of value there was common ground in relation to the approach to be followed – adopting the (2005 rating list) Valuation of Public Houses Approved Guide and reliance on comparable evidence;

iv. The UT was not persuaded that the properties provided by the appellant ratepayer were comparable – they were drinking establishments. The food pubs the VO put forward were more comparable with the subject property; and

v. The decision did, however, conclude as follows: 'Had I the power to do so, I would have had little hesitation in ordering the certificate's withdrawal served as it was over two years after the Form of Return, albeit finally, was submitted. The effect on the ratepayer's liability will be considerable and in my view unjust.'

20 CLG Consultation

Check, Challenge and Appeal – Reforming business rates appeals
Deadline for Comments: 04.01.16

This consultation invites comments on the Government's latest proposals to reform the business rates appeal system. It follows its 2013 consultation *'Checking and Challenging your Rateable Value: The Government's proposals to improve transparency in the business rates valuation and formal challenge system'*. The new approach detailed in this paper was set out in the Interim Findings of Business Rates Administration Review discussion at Autumn Statement 2014. The aim is to build a system that allows factual and valuation issues to be dealt with in a more timely and efficient manner. The new system consists of three stages:

- Check – when relevant facts are validated by the ratepayer and agreed as far as possible. This is the stage at which differences between the ratepayer and the VO will be established;
- Challenge – when the ratepayer can challenge the rating list entry. The ratepayer must set out their reason for the challenge and put forward an alternative rating list entry (which will include an alternative valuation if that is the reason for the challenge), backed by supporting evidence. After discussion between the parties the Valuation Office Agency (VOA) will issue a decision on whether the rating list will be altered and the level of any revised valuation; and
- Appeal – when the ratepayer can appeal to the Valuation Tribunal for England (VTE) which will consider whether the VOA has made the correct decision in respect of the challenge based on the evidence put forward and exchanged at the challenge stage. The VTE may conclude that the ratepayer's proposed entry is correct, or alternatively it may substitute its own.

The onus will be on ratepayers to set out their issues fully and clearly at the start of each stage to which the VOA must respond. The ratepayer then decides whether or not it wishes to proceed to the next stage.

Subject to Parliamentary approval, primary legislation amending existing enabling powers will be enacted in the current session's Enterprise Bill, and regulations will then be brought forward setting out the details of the various stages, based on the ideas outlined in this consultation paper. It is intended that the reformed system will be in operation when the new rating list comes into effect in April 2017.

https://www.gov.uk/government/consultations/reforming-business-rates-appeals-check-challenge-appeal

If you require advice on rating issues, contact Jerry Schurder on Tel. +44 (0)20 7333 6324 jschurder@geraldeve.com

LEASEHOLD REFORM

21

Leasehold enfranchisement – Leasehold Reform Act 1967 – Enfranchisement of house – shop with self-contained flat above – definition of house in s2(1) of 1967 Act – whether building a house 'reasonably so called'

**JEWELCRAFT LTD V PRESSLAND
[2015] PLSCS 300 – Decision given 29.10.15

Facts: The appellant, J, was the long lessee of a building comprising a shop with living accommodation above in Putney, London SW15. J sought to enfranchise the building under the Leasehold Reform Act 1967. The building formed part of a parade of shops built in the 1920s. The ground floor shop had a plate glass window onto the street and was used as a newsagent, sweet shop and tobacconist. There was a self-contained flat above which was accessed via an external staircase in the yard to the rear of the property. The original internal staircase had been removed in the 1970s when the flat was created. The whole of the building was sublet to Martins Newsagents on terms that restricted occupation of the flat to an employee of the business.

Point of dispute: Whether the building was a 'house' within the definition of s2(1) of the 1967 Act. It was common ground that it was 'designed or adapted for living in' but the respondent disputed whether it was a house 'reasonably so called'.

Held: J's appeal was allowed against the ruling of the judge in the court below who dismissed the enfranchisement claim. The judge found that the building could not reasonably be called a house since it had not been built as a house, but as a shop with living accommodation above and the character of the parade was overwhelmingly one of commercial premises. The Court of Appeal held as follows:

- The use of part of a building as a shop or for other commercial purposes was not in itself a bar to the property being a 'house' within the meaning of s2(1) of the 1967 Act. The amendment to the Act made by the Commonhold and Leasehold Reform Act 2002 had removed the residence requirement for enfranchisement which had extended the right to enfranchise to lessees of buildings used exclusively for commercial purposes, provided they qualified as houses as defined;
- The statutory definition of 'house' operated as a purpose-made, and therefore extended, definition of that term designed to carry into effect the policy of the 1967 Act. In difficult cases, such as where the building was used for commercial purposes the entitlement to enfranchisement would depend upon the words 'reasonably so called';
- Shops with accommodation above were, as a matter of law, reasonably to be described as houses for the purposes of s2(1) provided that a material part of the building was designed or adapted for, and used for, residential purposes on the relevant date; and
- The external and internal physical character and appearance of the building and the descriptions of it in the lease were not determining factors in deciding whether the building was a house 'reasonably so called'. In this case the removal of the internal staircase and the construction of an external means of access to the flat in J's building did not have the effect of taking the building outside the scope of what could reasonably be called a house for the purposes of s2(1) as the flat remained accessible by means of a staircase situated within the demise.

If you require advice on leasehold reform issues, contact Julian Clark on Tel. +44 (0)20 7333 6361 jclark@geraldeve.com

HOUSING

22 Homes & Communities Agency Bulletin

Housing market bulletin – September/October 2015

The housing market bulletin provides the latest information on the housing market, the economy and the housebuilding industry.

- National average house prices remain strong, but they are increasing at a slower rate than at the same time last year. However they are still higher than both retail price inflation and average wage inflation.
- There was a small fall in the number of home sales in September, but the seasonally adjusted trend has generally been upwards in 2015. Total mortgage lending continues to increase.

https://www.gov.uk/government/publications/housing-market-bulletin

REAL PROPERTY

23 Upper Tribunal: Lands Chamber

Discharge or modification of restrictive covenants – s84(1) Law of Property Act 1925 – whether compensation to be awarded to objectors on discharge or modification

*RE LAAV'S APPLICATION
[2015] PLSCS 274 – Decision given 10.09.15

Facts: L owned a large freehold house on a residential estate in Southend-on-Sea, Essex. The house, which had been built in 1960, was originally held on a long lease which contained covenants against building, but in 1989 L's predecessor in title acquired the freehold from a company which at that time owned the freehold of the entire estate. The 1989 transfer contained restrictive covenants which prevented the property being used other than as a single private dwellinghouse with the surrounding land to be kept as gardens and grounds. In 2012, having secured planning permission to construct a second dwelling in the garden of the property, L applied under s84(1) of the Law of Property Act 1925 to discharge or modify the restrictive covenants, relying on grounds: (a) that the restrictions were obsolete; and (aa) that they impeded a reasonable use of the land and did not secure any practical benefits of substantial value or advantage to those who were entitled to their benefit. The company and the owners of two neighbouring properties objected to L's application.

Point of dispute: Whether L's application would be allowed. The company accepted that the grounds for discharge or modification were made out, but sought compensation under s84(1)(ii) on the basis that the existence of the restrictions had reduced the amount of consideration it had been paid in 1989. The neighbouring owners contended that the new house would be out of keeping with the surrounding properties, cut out light and impede views and that the values of their properties would be adversely affected.

Held: L's application was allowed.

i. The test of whether a restriction was obsolete under s84(1)(a) was whether it could still achieve its original purpose. The purpose of the original 1989 restriction was to maintain the character of the estate as an exclusive, high-class residential area by limiting the development of the land to a single house and preventing alternative development such as flats. Notwithstanding that many of the plots now had two houses, the tone of the estate had been maintained. The purpose of the restriction would still be maintained even if a second house were built on L's property, which meant that it was not obsolete and ground (a) in s84(1) was not made out.

ii. The application would be allowed on ground (aa). The proposed use was reasonable since planning permission for it had been obtained and it was in keeping with other development on the estate. The restrictions did not secure any practical benefits to the owners of the adjoining properties. This was already a developed residential area and the addition of a further house to the rear of L's property fitted in with the general layout of the area and would not make a material difference to the objectors.

iii. There was no merit in the company's claim for compensation since there was no evidence that the existence of the restrictions had affected the consideration paid to the company for the freehold in 1989.

If you require advice on real property issues, contact Annette Lanaghan on Tel. +44 (0)20 7333 6419 alanaghan@geraldeve.com

COMPULSORY PURCHASE

24 Upper Tribunal: Lands Chamber

Compulsory purchase – compensation – compulsory Purchase Act 1986 – Gas Act 1986 – assessment of compensation for acquisition of rights relating to installation and use of gas pipeline under claimant's land

*ELITESTONE LTD V NATIONAL GRID GAS PLC
[2015] PLSCS 272 – Decision given 02.09.15

Facts: E, the claimant owned a 33.2 acres of brownfield land which it had acquired in 1989 with a view to extracting coal deposits and eventually redeveloping it for residential purposes. In 1992 part of the site was transferred to a rugby club with a restriction on its use. In 2006/2007 the acquiring authority, NGG, acquired rights to lay, use, maintain, repair and replace a high-pressure natural gas pipeline under the land.

Point of dispute: Whether E was entitled to compensation under s7 of the Compulsory Purchase Act 1965, as modified by para 7 of Schedule 3 to the Gas Act 1986. E claimed over £4.5m in total, comprising payments for:

i. loss due to disturbance and damage during the occupation and use of the land by NGG in connection with the pipeline construction process;
ii. loss that E would suffer from not being able to work the mineral deposits on its land;
iii. diminution in value of its land due to sterilisation; and
iv. diminution in value of the restrictive covenant that E held over the rugby club land.

Held: E's claim was dismissed in its entirety.

i. This was in effect a claim for damages by reference to a tariff of standard payments which the acquiring authority adopted when agreeing payments with landowners. There was no agreement in this case and no evidence to support a claim for damages. E had not suffered any loss through the occupation of the land for the pipeline construction process since it had been disused throughout that period.
ii. E could not succeed in its claim for injurious affection under s7 of the 1965 Act as modified by the 1986 Act. The matter had to be viewed by reference to what a prospective purchaser of the land would have known, or could have found out, about what was going to be installed under the land and its implications for development potential. A heavy wall underground pipeline would be no bar to development or coal extraction.
iii. This claim also failed.
iv. E was not entitled to compensation for loss of the opportunity to extract, at some future date, a percentage of any enhanced development potential of the rugby club land in return for agreeing to modify or discharge the restrictive covenant. On the evidence there had been no sterilisation of the land as a result of the pipeline and thus no loss of potential development value.

25 Upper Tribunal: Lands Chamber

Compulsory purchase of claimant's house – assessment of compensation – whether claimant entitled to home loss payment under s29 Land Compensation Act 1973

*PARMAR V BARNET LONDON BOROUGH COUNCIL
[2015] PLSCS 290 – Decision given 28.09.15

Facts: The acquiring authority, BLBC, acquired P's freehold interest in a three-bedroom house in Hendon, London NW4 pursuant to a compulsory purchase order dated November 2009. BLBC took possession of the house in January 2014 which was the valuation date for the purpose of assessing the amount of compensation due to P. The property was in a derelict state but had planning permission for an extension. P did not respond to an earlier notice to treat and BLBC referred the question of the disputed compensation to the Upper Tribunal under s6 of the Compulsory Purchase Act 1965.

Point of dispute: The correct valuation for the property and whether, in addition to its open market value, P was entitled to a 'home loss payment' or a 'basic loss payment' under s29 and 33A of the Land Compensation Act 1973 respectively.

Held: The issues were determined as follows:

i. The open market of the house at the valuation date was £650,000.

ii. As there was no evidence that P had been in occupation of the property for a period of one year up to her date of displacement she was not entitled to a home loss payment under s29 of the Land Compensation Act 1973. Nor was she entitled to any discretionary payment as she was not in occupation of the property at the date of displacement.

iii. P was not entitled to a basic loss payment under s22 since she needed to apply in writing for this and no such application had been made.

iv. It would not be too late for P to make an application for a basic loss payment under s33E; this would be fixed at £48,750, representing 7.5% of the open market value of the property. Such an application would have to be made within six years of the valuation date of January 2014.

26 Response to consultation

Improving the compulsory purchase process

This document contains a summary of the responses to the technical consultation on improvements to the compulsory purchase system, which closed on 09.06.15, and details of which proposals the government intends to take forward.

https://www.gov.uk/government/consultations/improving-the-compulsory-purchase-process

27 CLG Guidance

Compulsory purchase process and the Crichel Down Rules

This revised guidance reflects legislative changes and case law since 2004 with the aim of making the information that people need in order to understand how the compulsory purchase system works simpler and more accessible. It replaces Circular 06/2004 and 13 other circulars and government guidance documents.

https://www.gov.uk/government/publications/compulsory-purchase-process-and-the-crichel-down-rules-guidance

If you require advice on compensation & compulsory purchase issues, contact Tony Chase on Tel. +44 (0)20 7333 6282 tchase@geraldeve.com

TORT

28 Court of Appeal

Professional negligence – valuation of commercial property in connection with commercial mortgage-backed securities – security for loan – loan transferred to respondent and property sold at undervalue – whether appellant negligently overvaluing property – whether respondent had standing to sue

*TITAN EUROPE 2006-3 PLC V COLLIERS INTERNATIONAL UK PLC (IN LIQUIDATION)
[2015] PLSCS 307 – Decision given 03.11.15

Facts: The appellant company, C, was part of a global real estate services organisation which specialised in valuing commercial properties. The respondent, TE, was an Irish company which issued commercial mortgage-backed securities. In 2005 C valued a large commercial property in Nuremberg, Germany at €135m on the basis of the third party lender's instructions to assume a passing rent of €9.28m. The valuation was carried out as security for a loan to the landlord. At the time of the valuation the property was tenanted, with ten years out of a 15-year lease term to run, but when both the landlord and the tenant became insolvent in 2009 the property sold for only €22.5m. The third party lender later transferred the loan and security to TE which packaged together a number of similar loans as investments for subscribers (noteholders) who invested in floating rate notes issued by TE. TE remained the legal and beneficial owner of the loans and securities. C's valuation certificate stated that it was addressed to, and could be relied on, not only by the lender but also by *'any actual or prospective purchaser, transferee, assignee, or servicer of the loan, any actual or prospective investor…in any securities evincing a beneficial interest in or backed by the loan'*.

Point of dispute: Whether to allow C's appeal against the finding of the judge in the court below that C's valuation had been negligent. Having considered the market evidence he held that the correct valuation for the property in 2005 would have been €103m, which meant that C's valuation fell outside the 15% permissible margin of error. The judge rejected C's argument that TE had not relied on the valuation and had suffered no loss, as the risk of over-valuation had been passed on to the noteholders who invested in the security.

Held: The appeal was allowed.

i. The 'correct' value could not be €103m when there had been an actual sale of the property six months before C's valuation at €127.1m. An exercise looking at yield percentages, lease length etc. produced a 'correct' value of €118.3m for the property which was within the accepted 15% margin of error. On this basis the appeal was allowed.

ii. *Per curiam:* If C had been negligent TE would have been able to recover the difference between the valuation and the 'correct' value. As the legal and beneficial owner of the loan and of the securities this gave it not only the right to sue in respect of any negligence, but also the right to recover substantial damages. TE might have parted with the risk but it had retained the property in the loans and the securities and therefore had title to sue C for its negligence. Although it had passed on the risk to the noteholders, TE had still suffered loss as a result of C's negligence because it would have paid too high a price for the loans since the securities included an over-valued property.

29 Central London County Court

Claim by lender against defendant valuer for negligent over-valuation of property in connection with mortgage loan – whether claim in tort against valuer time-barred – date when cause of action accrued

*CANADA SQUARE OPERATIONS LTD V KINLEIGH FOLKARD & HAYWARD LTD
[2015] PLSCS – Decision given 17.09.15

Facts: In 2006 a lender loaned £428,891.36 by way of an interest-only mortgage to the owners of a property in Brighton. The defendant, KFH, valued the property at £500,000, although the lender had previously obtained another valuation of £475,000. The borrower started missing interest payments in January 2007 and stopped paying altogether after January 2008. In August 2008 the property was surrendered to the lender who eventually managed to sell it in May 2009 for £309,000, but during the conveyancing process it was discovered that it was affected by a right of way. In October 2013 the lender brought proceedings against KFH for professional negligence in overvaluing the property. The right of action was later assigned to the claimant, CSO.

Point of dispute: Whether to allow CSO's claim against KFH. CSO's cause of action was brought in tort as it was accepted that the limitation period for a claim in contract had expired. KFH admitted that it had negligently overvalued the property, but argued that the claim was time-barred since the lender had first suffered measurable loss, and therefore the cause of action had arisen, more than six years earlier. It was agreed that the value of the property at the date of the mortgage advance was £430,000 without the right of way, and £397,000 with the right of way.

Held: The claim was dismissed.

i. The burden was on the claimant to establish that the cause of action had accrued on a date within the limitation period.

ii. The court had to value the security and the borrower's covenant. The point at which their combined value became less than the amount outstanding under the mortgage was the date on which the lender first suffered from measurable loss.

iii. The borrowers' financial situation should be taken into account.

iv. The existence of the right of way should be taken into account in valuing the lender's security as it could have been discovered in 2005/06.

v. When valuing the borrowers' covenant it was easiest to compare the value of the security with the amount outstanding from time to time and to ask, whenever there was a shortfall, whether the value of the covenant was sufficient to bridge the gap. At the outset of the loan the borrower's covenant was sufficient to bridge the gap between the loan amount and the actual value of the security, but once the first direct debit payment was missed in February 2007 the situation changed. At that date the gap which needed to be bridged was £18,550. The lender had not produced evidence that the borrowers' covenant was worth less than that amount at that date, and it had therefore failed to demonstrate that the loss had not accrued by February 2007. It followed, therefore, that the cause of action had arisen by that date and it was now time-barred.

Per curiam: Even if CSO's claim had not been time-barred, it would still have failed as there was no evidence that the lender had relied on KFH's valuation as opposed to the earlier valuation it had obtained.

ENERGY

30 CLG Statistical Publication

Energy Performance of Buildings Certificates in England and Wales: 2008 to September 2015

This publication contains information about certificates on the energy efficiency of domestic and non-domestic buildings in England and Wales that have been constructed, sold or let since 2008 and of larger public authority buildings since 2008. The figures are drawn from 2 datasets:

- EPCs for domestic and non-domestic properties covering England and Wales; and
- Display Energy Certificates for larger buildings occupied by public authorities in England and Wales.

https://www.gov.uk/government/statistics/energy-performance-of-buildings-certificates-in-england-and-wales-2008-to-september-2015

31 CLG Statistical Publication

Live tables on Energy Performance of Buildings Certificates

These live tables show data from certificates lodged on the Energy Performance of Buildings Registers since 2008, including average energy efficiency ratings, energy use, carbon dioxide emissions, fuel costs, average floor area sizes and numbers of certificates recorded.

https://www.gov.uk/government/statistical-data-sets/live-tables-on-energy-performance-of-buildings-certificates

LONDON

32 London Assembly Government Publication

Housing in London 2015

This document is the evidence base for the Mayor's London Housing Strategy. It summarises key patterns and trends across a wide range of topics which are relevant to housing in London. The seven sections of the document are as follows:

- Historical background;
- Demographic, economic and social trends;
- Housing supply and empty homes;
- Housing costs and affordability;
- Housing need;
- Mobility and decent homes; and
- Appendices.

http://www.london.gov.uk/priorities/housing-land/publications/housing-in-london-2015

33 London Government Consultation

Draft London Sustainable Drainage Action Plan
Deadline for Comments: 15.01.16

This draft Plan has been produced by the Mayor of London in partnership with Thames Water, the Environment Agency and London Councils. The aim of the new approach is to capture, delay and absorb rainwater rather than treat it as a waste by-product by creating more green features such as rain gardens and green roofs. The draft Action Plan sets out the need for sustainable drainage systems to be implemented across London and proposes a series of actions for each of London's key land use sectors.

http://www.london.gov.uk/priorities/environment/publications/draft-lsdap

34 Greater London Authority Publication

A–Z of Planning & Culture

This publication was researched and written by the Mayor of London's Culture and Planning teams. It examines ways in which the planning system can support culture and creativity in view of current concerns that London's pubs, clubs, cinemas and other cultural venues are under threat e.g. the capital has 103 fewer live music venues than it did in 2007 and it is thought that approximately 3,500 artist studios will be lost in the next five years. The guide is aimed at councils, developers, planners, community groups and cultural bodies.

http://www.london.gov.uk/priorities/arts-culture/promoting-arts-culture/a-z-of-planning-and-culture

GENERAL

35 British Council of Offices publication (available to members only)

Office-to-residential conversion

This document examined how the change to the permitted development regime which was introduced in May 2013 and made it easier for offices to be converted to residential has affected the office market. The research looked into the London and Bristol markets in detail and found that the impact on the market in those cities was substantial.

http://www.bco.org.uk/Research/Publications/Office-to-residential_conversion.aspx

36 CLG Statistical Release

Local Planning Authority Green Belt: England 2014/15

- On 31.03.15 it was estimated that the extent of the designated Green Belt in England was 1,636,620 hectares, representing around 13% of England's total land area.
- Between 2013/14 and 2014/15 the area of Green Belt has decreased by 2,000 hectares.
- In 2014/15 11 authorities adopted plans which will result in a decrease in the overall area of Green Belt compared to 2013/14.

https://www.gov.uk/government/statistics/local-authority-green-belt-statistics-for-england-2014-to-2015

37 Law Commission Consultation

Consultation on Residential Leases: Fees on Transfer of Title, Change of Occupancy and Other Events
Deadline for Comments: 29.01.16

Some residential leases require the leaseholder to pay a substantial fee on the sale of the property or other event. These fees are very common in specialist housing for older people and are known by many names such as 'contingency fees', 'transfer fees', and 'deferred management fees'.

In 2013 the Office of Fair Trading published an investigation into transfer fees which concluded: 'the unusual, complex and delayed nature of transfer fee terms, coupled with behavioural biases, may … lead to a significant imbalance between landlords and consumers, to the detriment of the consumer.' It commented on the lack of clarity in the existing legal framework and recommended that consideration be given to legislative reform. This paper examines these fees in detail, makes provisional proposals and invites views on these. The Law Commission's overall conclusion is that event fees have an important role to play in meeting the costs of specialist housing for older people, but that the market needs to be much more transparent. Purchasers should be told about the fees at an early stage and given enough information early in the purchase process to enable them to make a decision as to whether they definitely want to proceed. In addition, they should be entitled to redress against estate agents and developers who break the rules.

http://www.lawcom.gov.uk/project/transfer-of-title-and-change-of-occupancy-fees-in-leaseholds/

GERALD EVE'S UK OFFICE NETWORK

Gerald Eve LLP is an independent firm of chartered surveyors and property consultants, employing more than 390 people across the UK.

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Evebrief has been established for more than 30 years. It is a summary of the latest statutory and legal cases affecting the property industry and is widely regarded in the industry as the most comprehensive document of its type.

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Abbreviations
The following abbreviations are used in evebrief:

BLD	Lexis Nexis Butterworths (internal abbreviation)
EG	Estates Gazette
EGLR	Estates Gazette Law Reports
EWCA	England & Wales Court of Appeal
EWHC	England & Wales High Court
P&CR	Property, Planning and Compensation Reports
PLSCS	Property Law Service Case Summaries

The star system
Cases are marked with one, two or three stars as follows:

*** Essential reading on the point of law or valuation with which the case is concerned, because it adds to, or clarifies or changes, the law.

** Noteworthy case which does not significantly alter the law or which relates to a relatively obscure point.

* Interesting but non–essential reading.

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EVEBRIEF

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SCOTLAND

PLANNING

01 Scottish Government Consultation

Independent Review of Planning
Deadline for Comments: 01.12.15

The Scottish Government has announced that it intends to review the Scottish planning system. The review will be undertaken by an independent panel and will focus on the following key themes:

- development planning;
- housing delivery;
- planning for infrastructure;
- streamlining development management;
- leadership, resourcing and skills; and
- community engagement.

The Panel are inviting written evidence from all those with an interest in the planning system.

https://consult.scotland.gov.uk/digital-communications/independent-review-of-planning

02 Scottish Government Statistics

Planning Performance Statistics, 2015/16, Q1

This report presents the latest summary statistics on planning decision-making and timescales for April to June 2015 (Quarter 1), as well as historic data going back to the first quarter of 2012/13. It is based on data collected by the Scottish Government from Local and Planning Authorities as part of the Planning Performance Framework (introduced in 2012).

http://www.gov.scot/Publications/2015/10/3126

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GERALDEVE

RATING

03 Scottish Government Consultation

Consultation on the setting of Decapitalisation Rates
Deadline for Comments: 23.11.15

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This consultation paper addresses prescription of the decapitalisation rate to be used when subjects are valued using the contractor's basis.

https://consult.scotland.gov.uk/digital-communications/setting-of-decapitalisation-rates

GENERAL

04 Scottish Government Consultation

Consultation on a draft statutory code of practice and training requirements for letting agents in Scotland
Deadline for Comments: 15.11.15

The Housing (Scotland) Act 2014 introduced a framework for the regulation of letting agents in Scotland, including:

- a mandatory register of letting agents with an associated 'fit and proper' person test;
- a training requirement that must be met to be admitted to the register;
- a statutory code of practice all letting agents must follow;
- a way for tenants and landlords to resolve complaints against letting agents for breaches of the statutory Code of Practice through a new specialist First-tier Tribunal; and
- powers for Scottish Ministers to obtain information and to inspect to monitor compliance and enforce regulatory requirements.

Part 1 of this consultation seeks views on a draft Letting Agent Code of Practice and, Part 2, on the Government's proposal for the training requirement that applicants must have met to be accepted onto the Letting Agent Register.

https://consult.scotland.gov.uk/better-homes-division/lettingagentconsultation

WALES

PLANNING

05 Welsh Statutory Instrument

WSI 2015/1736 The Planning (Wales) Act 2015 (Commencement No. 1) Order 2015

This Order was made on 29.09.15. Article 2 brought s4 of the Planning (Wales) Act 2015 into force on 05.10.15, insofar as that section was not already in force. Section 4 relates to the process for designating strategic planning areas and establishing strategic planning panels.

http://www.legislation.gov.uk/wsi/2015/1736/contents/made

06 Welsh Statutory Instrument

WSI 2015/1794 The Town and Country Planning (Power to Override Easements and Applications by Statutory Undertakers) (Wales) Order 2015

This Order, which came into force on 14.10.15, confers powers on local authorities and other bodies to override easements and other rights which would otherwise restrict their use of land that has been acquired or appropriated for planning purposes. It also disapplies the requirement for the Welsh Ministers and the appropriate Minister to decide jointly certain planning applications and appeals where the application has been made by a statutory undertaker, although if they wish the Welsh Minister or the appropriate Minister may direct that the requirement for joint decisions continues to apply in relation to the relevant application or appeal.

http://www.legislation.gov.uk/wsi/2015/1794/contents/made

07 Welsh Government Research Report

Stalled Sites and Section 106 Agreements (Wales)

This report identifies and quantifies the sites that are stalled as a result of issues relating to a s106 agreement. The reasons why these sites are stalled are also examined. The report makes recommendations on the following matters:

- improving the transparency of the s106 agreement system;
- encouraging greater awareness and knowledge of processes within the system; and
- reducing delays.

Research commissioned by the Welsh Government in 2014 identified delays in completing s106 agreements as a barrier to the delivery of housing. This follow-up research was commissioned to gain an understanding of the extent of stalled developments due to s106 agreements and the reasons for this, but it has concluded that there is not a single solution to the cause of delays to sites where s106 agreements are involved.

http://gov.wales/topics/planning/planningresearch/publishedresearch/stalled-sites-and-section-106-agreements/?lang=en

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RATING

08 Statutory Instrument

WSI 2015/1759 The Non-Domestic Rating (Miscellaneous Provisions) (Amendment) (Wales) Regulations 2015

Paragraph 2(1) of Schedule 6 to the Local Government Finance Act 1988 ('the 1988 Act') provides that the rateable value (RV) of a non-domestic hereditament is taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to be let from year to year. In cases where there is no available information on the general rental market and profit and loss cannot be used as an indication of rental value, the RV of a non-domestic hereditament is instead ascertained by decapitalising the estimated total capital value of the hereditament (this is known as 'the contractor's basis of valuation'). The decapitalisation rates are prescribed in regulation 2 of the 1989 Regulations. W.e.f. 31.10.15 these Regulations amend the decapitalisation rates prescribed by regulation 2 of the 1989 Regulations for non-domestic rating lists compiled on or after 01.04.17.

http://www.legislation.gov.uk/wsi/2015/1759/introduction/made

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NORTHERN IRELAND

PLANNING

09 Statutory Instrument

NISR 2015/344 The Planning (Hazardous Substances) (No. 2) Regulations (Northern Ireland) 2015

These Regulations, which came into force on 16.10.15, implement the land-use planning obligations (articles 13 and 15) in European Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances. They revoke and replace the 2015 Regulations (SR 2015/61)

http://www.legislation.gov.uk/nisr/2015/344/introduction/made

10 Department for the Environment Policy Statement

Strategic Planning Policy Statement for Northern Ireland – Planning for Sustainable Development

Following extensive consultation with key planning stakeholders this publication sets out the Department's regional planning policies for securing orderly and consistent development in Northern Ireland under the reformed two-tier planning system. This SPS must be taken into account in the preparation of Local Development Plans, and it is also material to all decisions on individual planning applications and appeals.

http://www.planningni.gov.uk/index/policy/spps.htm

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